Supreme Court, U.S.
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No. 00-1376

IN THE

Supreme Court of the United States

CARL GENE COLLINS, ROBERT W. PEUFFIER,

Petitioners,

v.

MACMILLAN-BLOEDEL, INC.,
JOHN CRANE CO., INC., and OWENS-ILLINOIS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT MACMILLAN-BLOEDEL, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUBERT A. CROUCH, III, ESQ.
KIRK T. FLORENCE, ESQ.
AMY E. NETTLE, ESQ.
CROUCH & INABNETT, L.L.P.
2300 Fountain Place
1445 Ross Avenue
Dallas, TX 75202
(214) 922-7100

ATTORNEYS FOR RESPONDENT
MACMILLAN-BLOEDEL, INC.

Wright Appellate Services 0503
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

23 pp

QUESTION PRESENTED

May the Judicial Panel on Multidistrict Litigation ("MDL") remand a cause of action to a district court for trial while retaining the claim for punitive damages in the MDL?

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

Petitioners

Carl Gene Collins, deceased

Robert W. Peuffier, deceased

Respondents

MacMillan-Bloedel, Inc., defendant in *Mary Collins v. MacMillan Bloedel, Inc.*

John Crane Co., Inc.

Owens-Illinois, Inc.

Other Defendants Below

The Flintkote Company, cross-defendant in *Mary Collins v. MacMillan Bloedel, Inc.*

Plaintiffs Below

Mary Nell Collins, Individually and as Personal Representative of the Heirs and Estate of Carl Gene Collins

Marjorie Peuffier, Individually and as Personal Representative of the Heirs and Estate of Robert W. Peuffier

Other Related Parties

Barbara and Frederick Hoffman, petitioners in the Third Circuit Court of Appeals

Rule 29.6 Disclosure

Pursuant to Supreme Court Rule 29.6, MacMillan-Bloedel, Inc. makes the following disclosures: 1) MacMillan-Bloedel, Inc. is now known as Weyerhaeuser Packaging, Inc.; 2) Weyerhaeuser Packaging, Inc. is owned by Weyerhaeuser (USA), Inc. which is owned by Weyerhaeuser Company; and 3) Weyerhaeuser Company is publicly traded.

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STATEMENT OF JURISDICTION

MacMillan-Bloedel, Inc. ("MacMillan") is a defendant in a lawsuit originally filed by Carl Gene Collins. Following Mr. Collins' death, Mary Nell Collins now pursues the claims at the trial court level, both individually and as personal representative of the heirs and estate of Carl Gene Collins. MacMillan is not a party to any claim filed by Mr. Peuffier or his estate.

MacMillan disputes that this Court has jurisdiction over the present matter. Petitioners are two deceased men, Carl Gene Collins and Robert W. Peuffier. Petition for Writ of Certiorari ("Pet.") at 2. Furthermore, Messrs. Collins and Peuffier were not parties to the proceeding in the court whose judgment is sought to be reviewed and are not entitled to file documents with this Court. SUP. CT. R. 12.6. The action in the lower appellate court was pursued by Mary Nell Collins and Marjorie Peuffier, the personal representatives of the two deceased men. Since neither representative has timely filed a document with this Court, they are not entitled to relief. *Id.* There is no petitioner requesting relief over whom the Court may exercise jurisdiction.

Supreme Court Rule 35 addresses the issue of the death of a party which occurs after that party files a petition for writ of certiorari. It requires that a representative be named for the deceased party. If the representative is not substituted, the moving party is entitled to have the petition for writ of certiorari dismissed. SUP. CT. R. 35.1. Additionally, FED. R. CIV. P. 25 states that an action as to a deceased party may be dismissed if the motion for substitution is not made 90 days after death is suggested upon the record. In this analogous situation, MacMillan is faced with a petition filed by de-

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STATEMENT OF THE CASE

The Petition for writ of certiorari stems from the latest in a series of mandamus petitions filed by asbestos plaintiffs' counsel seeking to challenge the remand practices within MDL 875, the multidistrict litigation proceedings concerning all federal asbestos-related personal injury and wrongful death cases. The Petition specifically challenges the Panel's practice of severing and retaining in MDL 875 claims for punitive or exemplary damages. The Panel followed this practice because coordinated and consolidated pretrial proceedings have not been concluded with respect to such claims, and remand is proper only for compensatory damage claims.

A. Procedural History

MDL 875 is the pretrial consolidation of all federal asbestos-related personal injury and wrongful death claims, before Hon. Charles R. Weiner in the Eastern District of Pennsylvania. It was established in 1991 by the Judicial Panel on Multidistrict Litigation in response to a judicial "asbestos crisis." The Petitioners' claims are among the more than 70,000 cases (many of which have multiple plaintiffs) that have been transferred to MDL 875.

Despite the fact that, under Judge Weiner's stewardship, more than 72% of all asbestos claims in MDL 875 have been resolved, the Petitioners assert that MDL 875 is ineffective. Against this backdrop, the Petitioners challenge whether the Panel, at the suggestion of Judge Weiner, has the power to remand compensatory damage claims to the transferor courts without also remanding any claims for punitive damages at the same time.

The Mandamus Petitioners requested that Judge Weiner suggest remand of their claims, including for punitive damages. Judge Weiner suggested remand of the compensatory claims, but not the claims for punitive damages.

The Mandamus Petitioners then asked the Panel to remand their claims, including the claims for punitive damages. The Panel declined, on the grounds that (1) MDL 875 continues to encompass coordinated pretrial proceedings concerning punitive damages claims and (2) whenever Judge Weiner "deems remand of the punitive damages claims in [these cases] appropriate, procedures are available whereby this may be accomplished with a minimum of delay." *See* 11/30/99 Panel Order in *Peuffier* (Mandamus Pet. Ex. N) at 2; 12/01/00 Panel Order in *Collins* (Mandamus Pet. Ex. O) at 2 (same).

The Mandamus Petitioners then sought a writ of mandamus from the Third Circuit to compel the Panel to order remand. The Third Circuit declined to order this extraordinary remedy, finding that no clear entitlement to it existed and the Panel had not egregiously erred. App. 3-7.

Now the Petitioners (but not the Mandamus Petitioners) ask this Court to review the Third Circuit's decision. They name as respondents not only MacMillan-Bloedel, but two parties who were not named below: Owens-Illinois (which appeared only as an amicus) and John Crane (which did not appear at all). They do not name as respondents other parties below, including the CCR defendants who were the principal respondents in the mandamus proceedings.

The Petitioners contend that the Third Circuit misconstrued 28 U.S.C. § 1407 by holding that the proviso of Section 1407(a), which expressly permits the Panel to remand only a portion of a case, does not permit the Panel to sever and retain in the transferee court claims for punitive damages. They assert that punitive damages are "issues" rather than "claims" and that such "issues" may not be severed and retained under Section 1407(a). Pet. 3-11.

As a threshold issue, neither the Petitioners nor the Mandamus Petitioners are entitled to relief. As noted in the List of Parties section above, the Petitioners cannot secure relief in this Court because they are deceased and were not even parties below, and the Mandamus Petitioners have forfeited any right to seek relief.

Aside from issues of standing, the issue presented in this case is not one of great importance meriting review, and in any event the Third Circuit's challenged holding is plainly correct. Nor is the Petitioners' factual contention that MDL 875 is a failure (which has been considered and rejected by no less than three courts) the kind of question worthy of review on certiorari.

B. The Creation and Success of MDL 875.

MDL 875 was created in 1991 in response to an asbestos litigation crisis in the federal courts. The Panel responded to the plea of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (the "Rehnquist Commission") that "'the federal judiciary must itself act now to achieve the best performance possible from the system under current law.'" *In re Asbestos Products Liability Litigation (No. VI)*, 771 F. Supp. 415, 420 (J.P.M.L. 1991), *quoting* Report of the Rehnquist Commission (March 1991) at 4.

Judge Weiner's performance as transferee judge in MDL 875 has been seriously mischaracterized by the Petitioners. The Administrative Office of the U.S. Courts, in its report surveying the five-year period through FYE September 30, 1997, observed:

> In July 1991, an order was issued transferring asbestos cases to the Eastern District of Pennsylvania (PA-E). As of September 30, 1997, 69,038 cases had been filed in or transferred to PA-E. In addition to closing more than 44,723 of those cases, the presiding judge has closed over 72 percent of the 4,231,123 claims encompassed in the 69,087 cases gathered in the transferee district, orchestrated settlements with respect to unfiled claims, and facilitated settlements of claims in several state court jurisdictions at the request of state court judges.
>
> . . . .
>
> . . . Judge Weiner of the Eastern District of Pennsylvania was able to close 6,168 asbestos cases this fiscal year, compared to an average of 385 civil cases per authorized judgeship.

Federal Judicial Caseload: A Five-Year Retrospective (available at www.uscourts.gov) at 7, 8.

Indeed, MDL 875 has been successful in ways beyond those noted in the Administrative Office's report. More recently, nearly 10,000 cases per year have been closed. *Id.* at 9. In denying a 1996 request that he suggest wholesale remand of transferred cases, Judge Weiner not only described

the procedures under which the parties had settled many current cases (then 40,000 out of 62,000 cases) and agreed on a claims handling process for future claims, but also noted that thousands of additional cases had been resolved in fact, though the paperwork had not been completed. *In re Asbestos Products Liability Litigation (No. VI)*, 1996 WL 539589, at *1 & n.3 (E.D. Pa. Sept. 16, 1996).[2] Judge Weiner noted that "[a]ll counsel who have cooperated with each other and have diligently pursued their cases and claims, and have sought the aid of the Court, have achieved a successful conclusion for their clients." *Id.* at *3.

There is no evidence that the transferee court has unreasonably determined the necessity of further pretrial proceedings. As the Third Circuit noted in *In re Patenaude*, 210 F.3d 135, 140 (3d Cir.), *cert. denied*, __ U.S. __, 121 S. Ct. 565 (2000), Judge Weiner *has* suggested remand of approximately 1,000 cases in which he judged the pretrial procedures to be exhausted. Judge Weiner has noted that in such cases "all but one or two defendants" typically have

2. Judge Weiner explained the paperwork lag:

> Many of the plaintiffs' counsel, and certainly most of the defendants, are engaged in thousands of cases. When settlement occurs, medical and exposure details may still need to be provided, releases must be signed, and frequently, the payout period may extend for several years. The last matter tended to by counsel is usually the submission of a dismissal order. As a result, the Court often finds that cases which remain on the dockets with seemingly large numbers of remaining defendants are either settled completely or have only one or two actual claims remaining.

Id. at *1 n.3.

settled or been dismissed by the time of remand, "and then, they routinely settle in total without trial. Of the very few trials which have actually occurred following transfer, a number have resulted in defense verdicts." *In re Asbestos Products Liability Litigation (No. VI)*, 1996 WL 539589, at *1 n.2.

The Judicial Panel on Multidistrict Litigation has commended Judge Weiner's continuing success in MDL 875. Several times it has denied motions for broad-scale remand to the transferor courts, absent Judge Weiner's suggestion, because his great success in handling MDL 875 has earned him deference in judging when the coordinated pretrial process was exhausted and remand was appropriate. *See In re Asbestos Products Liability Litigation (No. VI)*, at 2 (J.P.M.L. Sept. 30, 1996) (denying motions to remand all MDL 875 cases, or certain Florida cases) (3d Cir. Supp. App. 21);[3] *In re Asbestos Products Liability Litigation*

3. In this opinion, the Panel commended Judge Weiner's success in "(i) prioritizing serious disease cases, (ii) encouraging settlements, (iii) reducing transactions costs, and (iv) protecting the continued viability of defendants." *Id.* at 2.

The Petitioners claim that in prioritizing serious disease cases, Judge Weiner has refused to accelerate any case unless it involves a claimed malignancy. Pet. at 2. They cite nothing to support this assertion, with good reason. MDL 875 Administrative Order No. 3 allows acceleration of any serious case, whether or not involving malignancy.

The shared concern of the Third Circuit, the Panel, and Judge Weiner about the "continued viability of defendants" was, and remains, valid. Before MDL 875, 70% of asbestos product manufacturers, by market share, were in bankruptcy. During the

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(No. VI), at 2 (J.P.M.L. May 20, 1998) (denying motion to remand certain Oregon cases, noting that by May 5, 1998 Judge Weiner had closed 53,687 cases and returned 976 cases, including 29 Oregon cases, to the transferor courts); *In re Asbestos Products Liability Litigation (No. VI)*, at 2 (J.P.M.L. Feb. 5, 1999) (denying motion to remand certain New York and Georgia cases, noting that Judge Weiner had closed nearly 60,000 cases and returned nearly 1,000 cases, including 15 New York and 3 Georgia cases, to the transferor courts).

The Third Circuit has also repeatedly recognized the success of MDL 875. In 1999, the court noted:

> Judge Weiner . . . has had great success in handling the tsunami of asbestos cases sent his way. Almost 27,000 cases were initially consolidated in 1991. Since then, including the addition of tag-along cases, he has disposed of nearly 60,000. Also, nearly 1,000 actions or claims have been returned to their original transferor districts. Judge Weiner has proven himself an able manager of litigation that at every level has been

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first seven years of MDL 875, no further bankruptcies of asbestos defendants occurred. Even with Judge Weiner's successful efforts to coordinate the federal asbestos litigation, however, more major asbestos defendants have recently become insolvent and filed for bankruptcy protection, including in the past eighteen months GAF Corporation, Owens Corning, Fibreboard, Armstrong World Industries, W.R. Grace, Babcock & Wilcox, and Pittsburgh Corning Corporation. In these circumstances, coordination of the litigation is especially important.

> described as vexing. . . . The "just and efficient conduct" of the actions will therefore be well served by . . . transfer to [Judge Weiner's] watch.

In re Cimino, No. 99-1217, slip op. at 9 (3d Cir. July 26, 1999). In *Patenaude*, the court again noted Judge Weiner's success:

> This process has resulted in numerous cases being resolved. As of late 1996, some 62,000 cases had been assigned to MDL 875 and approximately 40,000 had been resolved. The remaining 22,000 cases included thousands of cases that had been resolved but not yet dismissed. As of January 1999, nearly 60,000 cases had been closed. Thus, in 1997 and 1998, the transferee court closed nearly 10,000 cases a year.

210 F.3d at 140 (internal citations omitted).

In its decision below, the court commended the efforts by Judge Weiner and the Panel to ensure that limited assets are available to help individuals who have been injured:

> Punitive damages are a windfall to the recipients over and above compensatory damages to which they are entitled. Indeed, in some jurisdictions, punitive damages are paid in part to the state rather than the individual plaintiff.
>
> The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is

> accelerating. It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls; this prudent consideration more than vindicates the Panel's decision to withhold punitive damage claims on remand. It is discouraging that while the Panel and transferee court follow this enlightened practice, some state courts allow punitive damages in asbestos cases. The continued hemorrhaging of available funds deprives current and future victims of rightful compensation.

App. 6-7.

REASONS FOR DISMISSING OR DENYING THE WRIT

I. The Writ Should be Dismissed Because No Party is Entitled to Relief Under the Petition.

The Petitioners are not proper parties in this proceeding. Only "parties" in the proceedings below can properly petition this Court for a writ of certiorari. Supreme Court Rule 12.4 provides:

> Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition.

The Petitioners, Mr. Collins and Mr. Peuffier, were not parties to the mandamus proceedings below; indeed, both

had died before the petition for writ of mandamus was filed. Because they were not parties, they are not entitled to petition this Court for relief.

Nor can the representatives of Mr. Collins' and Mr. Peuffier's estates now press this Petition. The Petitioners' widows, Mrs. Collins and Mrs. Peuffier, who appeared below as Mandamus Petitioners both individually and as the representatives of their husbands' estates, cannot seek relief. Under Supreme Court Rule 12.6, these Mandamus Petitioners, as parties below, were "deemed parties entitled to file documents in this Court." Rule 12.6 deems all such parties aligned with the Petitioners (who appeared below but did not themselves join the certiorari petition) as "respondents who support[] the position of a petitioner," and requires them to file a response "supporting the petition . . . within 20 days after the case [was] placed on the docket." Rule 12.6. They did not do so. Rule 12.6 expressly provides that, as a consequence, they "will not qualify for any relief from this Court."

Nor may the Mandamus Petitioners now substitute for the Petitioners in order to press this Petition. Supreme Court Rule 35.1 defines and limits the circumstances in which the representatives of an estate may be substituted for deceased petitioners. It provides that "[i]f a party dies *after* the filing of a petition for writ of certiorari . . . , the authorized representative of the deceased party may appear and, on motion, be substituted as a party." Rule 35.1 (emphasis added). Here, the purported Petitioners died *before* the Petition was filed — indeed, before the underlying proceedings before Judge Weiner, the Panel, and the Third Circuit even commenced. Rule 35.1 therefore does not allow substitution now. On the contrary, it suggests that the

proceedings must be dismissed. *See* Rule 35.1 ("If the representative [of the estate of a deceased party] fails to become a party" the opposing party "is entitled to have the petition for a writ of certiorari . . . dismissed;" "If the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate.").

The timely filing of a petition for a writ of certiorari is jurisdictional. *See* Supreme Court Rule 13.2; 28 U.S.C. § 2101(c). Because a timely petition was not filed by any party to the proceedings below, and because the Petition that was filed cannot be pressed by any party, the Petition should be dismissed.[4]

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4. As noted in the List of Parties above, the Petitioners' misidentification of the proper parties extends to the respondents. The CCR defendants (the principal respondents below), were neither named nor served, contrary to Rules 12.3 and 12.6. John Crane did not appear in the Third Circuit in any capacity, and so is not a proper respondent under Rule 12.6. Owens-Illinois appeared in the Third Circuit, but only as an amicus, and so is not a proper respondent either.

Owens-Illinois was originally a party in these cases, but resolved them prior to the filing of the petition for writ of mandamus. The Third Circuit granted Owens-Illinois leave to proceed as amicus curiae. It is unclear why Owens-Illinois has been named as a respondent before this Court. Nonetheless, while it has resolved these cases, Owens-Illinois has a continuing interest in the issues presented here.

Owens-Illinois, which has been named as a defendant in tens of thousands of asbestos personal injury cases, was a respondent in two of the prior mandamus proceedings (*In re Roberts*, 178 F.3d 181 (3d Cir. 1999) (denying petition for writ of mandamus), and (Cont'd)

II. If Not Dismissed Outright, the Writ Should be Denied.

Certiorari is reserved for cases presenting exceptionally important issues, such as when there is a split of authority or the lower court strayed from this Court's prior holdings. This is not such a case. The issue presented — whether the Third Circuit legally erred in denying mandamus — involves no split of authority. Mandamus is an exceptional remedy, rarely granted. The Third Circuit's decision was completely consistent with Section 1407.

A. The Third Circuit's Interpretation of Section 1407 Does Not Merit Review.

Supreme Court Rule 10 provides that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." None of the bases typically invoked for certiorari review applies here. The Third Circuit's decision does not conflict with a decision of any other Court of Appeals or of this Court. *See* Rule 10(a). Nor did the Third Circuit depart from the "accepted and usual course of judicial proceedings" or "sanction[] such a departure by a lower court" so as to call for this Court to exercise its supervisory power. *Id.* Nor does the issue present an important question of federal law that has not been, but should be, settled by this Court. *See* Rule 10(c). Indeed, there is no argument that

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In re Patenaude, 210 F.3d 135 (3d Cir.) (same), *cert. denied*, __ U.S. __, 121 S. Ct. 565 (2000)), and an amicus in another (*In re Herbold*, No. 00-1137 (3d Cir. May 31, 2000) (same)). Owens-Illinois continues to be vitally interested in the conduct of MDL 875 proceedings, where it remains a defendant in many cases.

the Third Circuit committed any other legal error — its decision was discretionary, and the requested writ of mandamus is an extraordinary one — much less a profound error meriting review.

The Petitioners suggest that the Third Circuit treated their claims too harshly when it applied long-settled mandamus standards to deny their petition. Pet. at 3. They contend that the statutory provision concerning review of Panel decisions must provide more searching review than that already "available at common law" by extraordinary writ: "Congress's specific instruction that the Panel be reviewed through mandamus would be superfluous unless the intention was to relax the standards applicable to this statutory mandamus remedy." *Id.*

The Petitioners' assertion has no merit. First, it is just not true that statutory review of the Panel's decisions must be more generous than common law mandamus. The Panel is a creature of statute and Congress has specifically circumscribed review of the Panel's decisions. For example, a decision of the Panel *not* to transfer an action cannot be reviewed. Period. *See* 28 U.S.C. § 1407(e) ("There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings."). *See also In re the Custody of Testa*, 1993 WL 88302 (D.C. Cir.) (denying a petition for writ of mandamus because the "statute establishing procedures for the Judicial Panel on Multidistrict Litigation precludes review of 'an order of the panel denying a motion to transfer for consolidated or coordinated proceedings'"), *quoting* Section 1407(e), *cert. denied*, 508 U.S. 954 (1993).

Congress could have provided that Panel decisions subject to review should be treated as final judgments for purposes of 28 U.S.C. § 1291, but it did not. Instead, Congress provided for review only by extraordinary writ. *See, e.g., Patenaude*, 210 F.3d at 140.

Second, the Petitioners' statutory versus common law mandamus argument was never raised by any party below, with good reason. In seeking the writ, the Mandamus Petitioners invoked the traditional test, which requires that petitioners have no other adequate means of relief available and that their right to relief is clear and indisputable. *See* Petition for Writ of Mandamus at 3 ("The two prerequisites for the issuance of a writ of mandamus are that the petitioners have no other adequate means to obtain the relief sought and that they have shown that their right to the writ is clear and indisputable."), *quoting Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, 32 F.3d 851, 861 (3d Cir. 1994), *quoting Kerr v. United States District Court*, 426 U.S. 394 (1976). The Petitioners' claim (to the extent the Petitioners have standing at all) must rise or fall with the arguments raised by the Mandamus Petitioners. The Mandamus Petitioners invoked the correct standard and lost below. The Petitioners cannot seek to change the applicable standard for the first time in this Court, particularly not as a basis for seeking review.

Nor is the issue on which the Petitioners have sought review particularly important. The substantive issue is a straightforward question of statutory interpretation: Does Section 1407(a) permit the Panel to sever punitive damages claims? As discussed in Section II.C below, the challenged interpretation of Section 1407(a) — an interpretation on which the district court, the Panel, and the

Third Circuit unanimously agreed — is plainly correct on the merits. Apart from the correctness of that interpretation, however, the issue does not merit review. The Petitioners have not cited a single case with which the Third Circuit's decision purportedly conflicts. Indeed, they have not cited a single case interpreting the proviso in Section 1407(a). If, as it appears, the issue whether the proviso permits the severance of punitive damages claims is one of first impression, then it is particularly unsuitable for certiorari review.

B. The Transferee Court's Treatment of Punitive Damages Claims Is Legitimate and Appropriate.

The Third Circuit held that "[a]n even more compelling reason to adopt the Panel's interpretation [of Section 1407(a)] is the public policy underlying the practice of severing punitive damages claims." App. 5. Characterizing the practice of severing punitive damages as "enlightened," the court noted that "[t]he resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating." *Id.* at 6.

In seeking review, the Petitioners challenge both the validity and the legitimacy of the Third Circuit's conclusion. They assert that MDL 875 has failed to provide relief to asbestos plaintiffs, preventing "the vast majority of those cases from reaching trial, even when discovery has been completed and settlement efforts have been exhausted." Pet. 2. They challenge the Third Circuit's and the Panel's endorsement of Judge Weiner's practice of seeking to preserve the assets of asbestos defendants. *Id.* These claims are untrue and, in any case, provide no basis for granting review.

1. Punitive Damage Claims Are Routinely Resolved With the Rest of the Claim.

The successive mandamus petitions challenging the MDL 875 remand practice have suggested that huge numbers of punitive damage claims, severed from the remainder of cases in MDL 875, remain in limbo, incapable of being addressed within the multidistrict proceedings and unable to escape. Not true. As the Third Circuit has noted (*Patenaude*, 210 F.3d at 140), by January 1999 nearly 60,000 cases had been resolved and dismissed *in their entirety* (punitive damage claims and all) within MDL 875, under Judge Weiner's aegis, with cases recently being resolved at a rate of approximately 10,000 per year. In addition, thousands more had been resolved in their entirety, though not yet dismissed because of paperwork lags. *Id.* at 139-40; *In re Asbestos Prods. Liability Litigation (No. VI)*, 1996 WL 539589, at *1 & n.3 (E.D. Pa. Sept. 16, 1996). Still more of these multi-defendant cases had been resolved in their entirety as to many defendants, with "only one or two actual claims remaining." *Id.* Since these resolutions include both compensatory and punitive claims, many thousands of punitive claims have been resolved.

The punitive claims at issue here are only a small fraction of those asserted at the outset. Judge Weiner has noted that he uses all his creative power to promote settlement before considering remand, and "as a practical matter, these actions are seldom returned [to the transferor courts] until [only] one or two defendants remains, and then, they routinely settle in total without trial." *Id.* at *1 n.2. The Third Circuit has approved Judge Weiner's MDL 875 management strategy to "resist . . . remand" until "avenues of settlement were exhausted." *Patenaude*, 210 F.3d at 140.

In each of the remanded cases, the bulk of the multiple defendants have already resolved the claims in their entirety — punitive claims and all. Only the punitive claims against those few defendants remaining experience the severance challenged here — and even then the parties remain free to, and according to Judge Weiner "routinely" do, settle all of their claims. The asserted 'problem' of severed punitive claims is therefore illusory.

2. The Remaining Punitive Claims Are Subject to Legitimate Pretrial Coordinated Proceedings.

Contrary to the suggestions of those who have challenged the MDL 875 remand practices, Judge Weiner may and does conduct legitimate coordinated pretrial proceedings concerning those punitive claims remaining in MDL 875. First, the transferee court may retain the punitive claims now and remand them later, for sequencing of claims is itself at the heart of pretrial coordination. Second, the retained punitive claims may be settled, for settlement is a legitimate pretrial proceeding. Finally, the transferee court may resolve the claims on their merits, for dispositions on motion are also legitimate pretrial proceedings.

a. Deferral of Punitive Claims.

The Third Circuit has recognized that legitimate multidistrict pretrial proceedings include coordination of single claims with the larger litigation as a whole. *Patenaude*, 210 F.2d at 142-45. One of the biggest challenges of coordination in the asbestos litigation has been to ensure the availability of funds to pay those who are truly sick or injured, in an arena where large numbers of claims continue to be

asserted, the defendants' resources are finite, and a large number of defendants have become bankrupt. This challenge of coordination was recognized by the Panel at the creation of MDL 875 (*In re Asbestos Prods. Liability Litigation (No. VI)*, 771 F. Supp. 415, 418-22 (J.P.M.L. 1991)), by Judge Weiner (e.g., *In re Asbestos Prods. Liability Litigation (No. VI)*, 1996 WL 539589, at *1), and by the Third Circuit (*Patenaude*, 210 F.3d at 139-40, 142-45).

Sequencing of claims for resolution is a proper part of pretrial multidistrict litigation. *See, e.g.*, Hearings Before a Subcommittee of the United States Senate Judiciary Committee on S. 3815, 89th Cong. 2d Sess. (Oct. 20-21, 1966) ("Senate Hearings") at 9 (test. of Dean Phil C. Neal re experience underlying enactment of 28 U.S.C. § 1407; emphasizing sequencing as a key part of coordinated pretrial proceedings). This is true even when the claims to be sequenced are of parallel urgency. It is especially so when the competing claims are *not* of equal urgency — when, as here, claims for core compensatory damages compete with demands for windfall punitive awards to which no plaintiff may claim a "right,"[5] whose payment today may imperil the ability of another plaintiff to recover compensatory damages tomorrow. This peril is very real given the numbers of claimants and the growing bankruptcies of defendants.

In these circumstances, the deferral of punitive damages claims, sequencing them after the more urgent compensatory damages claims, is perfectly proper "coordination" of the litigation under 28 U.S.C. § 1407.

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5. As the Third Circuit noted, App. 6, punitive damages are a "windfall," to which no plaintiff may claim a right. *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981) (punitive damages are a "windfall to a fully compensated plaintiff").

b. Settlement of Punitive Claims.

In fact, handling of the severed punitive claims is not limited to deferral for later remand. Judge Weiner may continue to encourage settlement of these claims.[6] Fostering settlement is, as the Third Circuit has held, both "coordinated" and "pretrial" activity, and therefore proper for MDL proceedings. *Patenaude*, 210 F.3d at 142-45. *See also* Senate Hearings at 11-12 (test. of Dean Neal).

c. Resolution of Punitive Claims.

Settlement is not the only means by which Judge Weiner could reach pretrial resolution of the punitive claims. Pretrial MDL proceedings may also include resolution by summary judgment. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 43 n.6 (1998) (decision on the merits is "perfectly proper as a pretrial order"); *Humphreys v. Tann*, 487 F.2d 666, 667-68 (6th Cir. 1973) ("pretrial proceedings" included all pretrial matters, such as motions for summary judgment); C. Wright & A. Miller, 15 Federal Practice & Procedure § 3866, at 606 n.1, 609-10 & n.10 (2d ed. 1986 & Supp. 2000) (same).

It is within Judge Weiner's power, as an MDL transferee judge, to reach and resolve the merits of the punitive damages claims. For example, under federal law there is a due process

6. Such settlements may be on a broad scale, even if a class action device is unavailable. For example, even though *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), held that parties to asbestos litigation could not settle future asbestos-related claims on a global basis through a class action, the defendants and plaintiff class attorneys in the *Amchem* case also successfully negotiated the settlement of all their current, existing cases, without the use of any class action.

limit on punitive damages. *B.M.W. of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996).[7] Judge Weiner may confront the issue whether the due process limit has been reached — particularly when some defendants have already paid substantial compensatory or punitive awards and have long since ceased any asbestos-related business, making any deterrence rationale for further punitive awards moot.[8]

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7. It is well established that repetitive punitive damages awards raise serious constitutional concerns. *See Dunn v. HOVIC*, 1 F.3d 1371, 1385-91 (3d Cir.) (en banc) (recognizing that repetitive awards of punitive damages could, on an appropriate evidentiary record, be shown to violate due process), *cert. denied*, 510 U.S. 1031 (1993); *In re Northern Dist. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 900 (N.D. Cal. 1981) ("Common sense dictates that a defendant should not be subjected to multiple civil punishment for a single act or unified course of conduct which causes injury to multiple plaintiffs."), *vacated on other grounds*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction."); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir. 1990); *Johnson v. Celotex Corp.*, 899 F.2d 1281 (2d Cir. 1990). In the absence of procedural safeguards, repetitive punitive damages cumulatively exceed the amount reasonably required to achieve the societal goals of deterrence and retribution, and unfairly subject defendants to multiple punishment for lawsuits arising from the same course of conduct.

8. Owens-Illinois, for example, commercially manufactured only a single asbestos-containing product, for ten years ending in April 1958. It nevertheless has been named hundreds of thousands of times in asbestos-related litigation, and has paid extraordinary amounts to resolve the compensatory damages claims in those cases. Punitive damages are unnecessary to deter it from conduct that, even if blameworthy at the time, ended more than forty years ago.

Retention within MDL 875 of punitive claims therefore may reflect not only a prudent priority on the resolution of compensatory claims, but also a necessary element of Judge Weiner's constitutional obligation to preserve the defendants' due process rights.[9]

C. Section 1407(a) Permits the Severance of Punitive Damages Claims.

Shorn of its rhetoric, the Petition seeks review on the ground that the Third Circuit erred in holding that Section 1407(a) permits the severance of punitive damages claims. There is no basis for contending that either the Third Circuit's or the Panel's interpretation of Section 1407 was wildly wrong so as to call for the exercise of this Court's supervisory power. At best, the Petitioners contend that the statute is ambiguous and that they have the better argument. That is not enough.

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9. Indeed, under *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), any further awards of punitive damages in the asbestos litigation may violate due process unless and until a rational system for reviewing awards of all punitive damages is set in place. While upholding the award in the *Haslip* case itself, this Court expressly rejected the notion that the imposition of punitive damages "is never unconstitutional" and expressed its concern about punitive damages that "run wild." *Id.* at 18. In order to ensure against punitive damages greater than necessary to accomplish the societal goals of deterrence and retribution, *Haslip* required the establishment of a system ensuring "rational decisionmaking" and "meaningful individualized assessment of appropriate deterrence and retribution." *Id.* at 20. No procedure, process or system has been established to ensure that remand would not result in the award of punitive damages as retribution for conduct already punished by other juries. By contrast, exclusion of punitive claims from remand orders is consistent with the constitutional obligation to avert the imposition of repetitive, overlapping and excessive punitive damages awards.

The Petitioners cannot claim that they are being deprived of an opportunity to seek redress for personal injuries, for the Panel has remanded the Mandamus Petitioners' compensatory damage claims for trial. The Petitioners cannot dispute that they seek, in the words of the Third Circuit, "exemplary punitive damage windfalls." App. 6.

On the merits, the Petitioners' construction of Section 1407(a) is untenable. According to the Petitioners, "claim" in Section 1407(a) should be read as synonymous with a stand-alone "cause of action" and a request for punitive damages should be interpreted merely as an "issue" as that term is used in Rule 42(b). Two reviewing courts thoroughly considered and rejected this argument below.

Before issuing its decision, the Panel heard argument on the Mandamus Petitioners' motion to remand their punitive claims. *See* Mandamus Pet. Ex. M, 11/19/99 transcript of hearing before the Judicial Panel on Multidistrict Litigation. As one Panel member noted at the hearing: "I am like Justice Stewart. I think I know what it is when I see it. It [punitive damages] looks like a claim to me." *Id.* at 19.

And despite the Petitioners' claim that the Third Circuit treated the Mandamus Petitioners harshly by affording scant review, that court ordered full briefing on the merits and issued a published opinion in which the court considered and rejected the claims. In particular, the Third Circuit noted that "[a]s a term of art and in common parlance, the meaning of 'claim' is not so circumscribed" as the Petitioners read it. App. 4. The court noted that "a cause of action based upon negligence is frequently described as including 'claims' for property damage, lost wages, medical bills, and pain and

suffering." *Id.* The court considered the statute's language and its legislative history, but could find nothing that would support the "crabbed reading" of "claim" the Mandamus Petitioners proposed. *Id.* Instead, the legislative history demonstrated that "Congress intended transferee courts to have broad pretrial authority." *Id.* (internal citations and quotation omitted). "In our view, the Panel's expansive interpretation of 'claim' is the more reasonable one and that which we endorse." *Id.*

The Panel and the Third Circuit did not adopt a wildly wrong interpretation of Section 1407(a). It would make no sense for this Court to grant review merely to endorse that interpretation, particularly when, as here, no other court has issued a conflicting opinion and there are serious issues whether any party before the Court is entitled to relief on the Petition.

CONCLUSION

For the foregoing reasons, Owens-Illinois, Inc. respectfully requests that the Petition for a Writ of Certiorari be dismissed or, in the alternative, denied.

Respectfully submitted,

ROBERT H. RILEY
CATHERINE M. MASTERS
Counsel of Record
NEIL LLOYD
SCHIFF HARDIN & WAITE
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500

Attorneys for Respondent
Owens-Illinois, Inc.

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